STATE OF MICHIGAN
IN THE SUPREME COURT

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCAL 6000; MICHIGAN CORRECTIONS ORGANIZATION, SEIU LOCAL 526M; MICHIGAN PUBLIC EMPLOYEES, SEIU LOCAL 517M; and MICHIGAN STATE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 5,

Plaintiffs-Appellants,

v

NATALIE YAW, EDWARD CALLAGHAN AND ROBERT LABRANT, in their official capacities as members of the Michigan Employment Relations Commission; RICHARD "RICK" SNYDER, in his official capacity as Governor of the State of Michigan; WILLIAM D. SCHUETTE, in his official capacity as Attorney General of the State of Michigan; and STATE OF MICHIGAN,

Defendants-Appellees.
_____/

Supreme Court No. 147700

Court of Appeals No. 314781

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

APPELLEES' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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Dated: May 14, 2014

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STATEMENT OF JURISDICTION

The standard of review stated in Plaintiffs-Appellants Unions' brief is complete and correct.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The Michigan Constitution granted the Legislature express authority to enact laws "relative to the hours and conditions of employment" under article 4, § 49. Section 49 did not exclude the classified civil service from the Legislature's reach, even though the people knew how to write that type of exclusion, having done so in the very next provision, § 48. Under article 11, § 5, the Civil Service Commission has the authority to *regulate* all conditions of employment in the classified service. Does the Constitution empower the Legislature to enact a right-to-work law that applies to state employees, even though the Commission has adopted a contrary rule that allows state employers to enter collective bargaining agreements that require state employees to pay union fees?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Court of Appeals' answer: No.

2. The First Amendment protects the right of free association, and the state government cannot condition employment on the relinquishment of rights under the First Amendment. The Commission rule here requires certain state employees to pay union dues as a condition of employment. Does this requirement violate the First Amendment?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Court of Appeals' answer: Yes.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Constitutional provisions

Article 4, § 48 of Michigan's 1963 Constitution provides:

> The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service.

Article 4, § 49 of Michigan's 1963 Constitution provides:

> The legislature may enact laws relative to the hours and conditions of employment.

Article 11, § 5 of Michigan's 1963 Constitution provides:

> The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department.
>
> The civil service commission shall be non-salaried and shall consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for terms of eight years, no two of which shall expire in the same year.
>
> The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the classified service and who shall be responsible to and selected by the commission after open competitive examination.
>
> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit,

efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

* * *

No person shall be appointed to or promoted in the classified service who has not been certified by the commission as qualified for such appointment or promotion. No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

Increases in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall require prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

* * *

The civil service commission shall recommend to the governor and to the legislature rates of compensation for all appointed positions within the executive department not a part of the classified service.

To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission. Within six months after the conclusion of each fiscal year the commission shall return to the state treasury all moneys unexpended for that fiscal year.

The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law.

Statutes

MCL 423.209, a provision modified by 2012 PA 349, provides, in relevant part, as follows:

> (2) No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:
>
> > (a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.
> >
> > (b) Refrain from engaging in employment or refrain from joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative.
> >
> > (c) Pay to any charitable organization or third party an amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.
>
> (3) A person who violates subsection (2) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.

MCL 423.210, the provision modified by 2012 PA 349, provides, in relevant part, as follows:

> (3) Except as provided in subsection (4), an individual shall not be required as a condition of obtaining or continuing public employment to do any of the following:
>
> > (a) Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative.
> >
> > (b) Become or remain a member of a labor organization or bargaining representative.
> >
> > (c) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of

value to a labor organization or bargaining representative.

(d) Pay to any charitable organization or third party any amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative.

MCL 423.204a, a provision of the Public Employment Relations Act, provides:

> The provisions of this act as to state employees within the jurisdiction of the civil service commission shall be deemed to apply in so far as the power exists in the legislature to control employment by the state or the emoluments thereof.

MCL 423.201(e), which defines "public employee," provides as follows:

> e) "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions:
>
> (*i*) A person employed by a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or who receives a direct or indirect government subsidy in his or her private employment is not an employee of this state or that political subdivision, and is not a public employee. This provision shall not be superseded by any interlocal agreement, memorandum of understanding, memorandum of commitment, or other document similar to these.
>
> (*ii*) If, by April 9, 2000, a public school employer that is the chief executive officer serving in a school district of the first class under part 5A of the revised school code, 1976 PA 451, MCL 380.371 to 380.376, issues an order determining that it is in the best interests of the school district, then a public school administrator employed by that school district is not a public employee for purposes of this act. The exception under this subparagraph applies to public school administrators employed by that school district after the date of the order described in this

subparagraph whether or not the chief executive officer remains in place in the school district. This exception does not prohibit the chief executive officer or board of a school district of the first class or its designee from having informal meetings with public school administrators to discuss wages and working conditions.

(*iii*) An individual serving as a graduate student research assistant or in an equivalent position and any individual whose position does not have sufficient indicia of an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1987-1 C.B. 296 is not a public employee entitled to representation or collective bargaining rights under this act.

Civil Service Commission Rules

Civil Service Commission Rule 6-7.2 provides:

6-7.2 Service Fee Authorized

Nothing in this rule precludes the employer from making an agreement with an exclusive representative to require, as a condition of continued employment, that each eligible employee in the unit who chooses not to become a member of the exclusive representative shall pay a service fee to the exclusive representative. If agreed to in a collective bargaining agreement, the state may deduct the service fee by payroll deduction. An appointing authority shall not deduct a service fee unless the employee has filed a prior written authorization or as otherwise authorized in a collective bargaining agreement.

INTRODUCTION

In 2012, the Michigan Legislature enacted a right-to-work law, known as PA 349, vindicating a fundamental freedom-of-association principle: every employee should have the freedom to choose whether to join a union or to pay a union service fee. The law precludes public employers from being required, "as a condition of obtaining or continuing public employment," to join a union or to pay any dues or fees to a union. MCL 423.10(3) (b) & (c). This statute, though, directly conflicts with a rule adopted by the Michigan Civil Service Commission that expressly authorizes public employers "to require, as a condition of continued employment," that the employee "pay a service fee" to the union. Commission Rule 6-7.2. This conflict raises a question: which controls, the Legislature's statute or the Commission's rule?

The plain language of the Michigan Constitution resolves this conflict. In article 4, § 49, the people gave the Legislature the broad authority to "enact laws relative to the . . . conditions of employment." On its face, this authority extends to all employees in the state, public or private, including those in the state classified civil service. And if that were not clear enough, the people of Michigan demonstrated that they knew how to exclude the civil service from the Legislature's realm, when they wanted to: the *immediately preceding provision* authorizes the Legislature to "enact laws providing for the resolution of disputes concerning public employees, *except those in the state classified civil service.*" 1963 Const, art 4, § 48 (emphasis added). This exception, spelled out in § 48 but not included in § 49,

confirms that the Legislature's broad power to enact laws governing conditions of employment extends to those in the classified civil service.

The authority that the people gave the Commission, in article 11, § 5, is a lesser authority: the authority to "regulate all conditions of employment in the classified service." Thus, § 49 and § 5 are easily reconciled: the Legislature may enact laws about conditions of employment, and within the scope of those laws, the Commission may regulate those conditions. To regulate is to serve the enacting authority's will. For conditions of employment, the Commission is subordinate to the Legislature. It is like any other agency in that regard. The Commission does not have the authority to disregard the Legislature in this arena.

This division of authority is consistent with our overall structure of government, which consists of three branches of government, not four. It is consistent with the concerns that led to the creation of the Commission in the first place: to eliminate the spoils system by ensuring that individuals were hired based on merit, not based on which politician they supported. Indeed, perpetuating a system where individuals have to join a particular group whose goal is to affect governmental policy (i.e., a public-employee union) to get hired is directly contrary to the goal of awarding position in the classified service "exclusively on the basis of merit, efficiency, and fitness." 1963 Const, art 11, § 5. It is consistent with case law from this Court and other Michigan courts and the numerous laws of general applicability that temper the Commission's authority. And it is consistent with this Court's teaching that the Commission's power "is to be exercised with respect to

determining the conditions '*of* employment,' not conditions *for* employment." *Council No. 11, AFSCME v Civil Service Commission*, 408 Mich 385, 406–407; 292 NW2d 442 (1980) (emphasis added).

COUNTER-STATEMENT OF FACTS

Constitutional framework

In 1963, when the people of Michigan adopted the current constitution, they reaffirmed that our government consists of three separate branches. 1963 Const, art 3, § 2 ("The powers of government are divided into three branches: legislative, executive, and judicial."). Among those branches, they vested "[t]he legislative power" in "a senate and house of representatives." 1963 Const, art 4, § 1. In 1963, the law was clear that the legislative power was plenary: " 'The legislative authority of the State can do anything which it is not prohibited from doing by the people through the Constitution of the State or of the United States.' " *Connor v Herrick*, 349 Mich 201, 223; 84 NW2d 427 (1957), quoting *Attorney General ex rel O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936).

In the Constitution, the people specifically authorized the Legislature to enact laws that would affect employees:

- "The legislature may enact laws providing for the resolution of disputes concerning public employees, *except those in the state classified civil service.*" Const 1963, art 4, § 48 (emphasis added).
- "The legislature may enact laws relative to the hours and conditions of employment." Const 1963, art 4, § 49.

In § 48, the people expressly limited the Legislature's authority, making clear it did not reach disputes concerning public employees in the classified civil service. The people did not include that limitation in § 49, the immediately adjacent provision.

In the 1963 Constitution, the people also created the Civil Service Commission. In addition to the other powers the people gave the Commission—powers including the authority to "classify" positions and "fix" rates of compensation—the people authorized the Commission to "regulate" conditions of employment:

> The commission shall . . . regulate all conditions of employment in the classified service. [1963 Const, art 11, § 5.]

Both article 4, § 49 and article 11, § 5 thus use the phrase "conditions of employment," with the former authorizing the Legislature to enact generally applicable laws about "conditions of employment" and the latter authorizing the Commission to regulate "conditions of employment in the classified service."

PA 349

Governor Snyder signed PA 349 into law on December 11, 2012. (Defs' App at 2b-7b, Compl, Ex A.) Codified at MCL 423.209 and 210, PA 349 amends the Public Employment Relations Act (PERA). Sections 9 and 10 prohibit Michigan's public employers from interfering with an employee's right to work without being compelled to join a union or pay a service fee. Specifically, "an individual shall not be required as a condition of obtaining or continuing public employment to . . . [b]ecome or remain a member of a labor organization . . . [or] [p]ay any dues, fees,

assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization . . . ." MCL 423.210(3)(b) & (c).

Civil Service Commission Rule 6-7.2

Prior to the enactment of PA 349, the Commission had promulgated a rule allowing public employers "to require, as a condition of continued employment, that each eligible employee . . . shall pay a service fee to the exclusive representative." Commission Rule 6-7.2. This rule and statute thus establish opposing commands.

PROCEEDINGS BELOW

The Unions filed their challenge to PA 349 as an original action in the Court of Appeals, consistent with the Legislature's determination that "the court of appeals should have exclusive original jurisdiction" over all challenges to the right-to-work law. MCL 423.210(6). They requested a declaration that PA 349, as applied to the classified civil service, violates two constitutional provisions (article 11, § 5 and article 4, § 48) and one statute (Section 4a of the PERA, MCL 423.204a). Shortly thereafter, the Court of Appeals granted the Commission leave to file an amicus brief in support of the Unions.

On August 15, 2013, the Court of Appeals issued its 2-1 opinion concluding that the Legislature has the authority to enact legislation with regard to agency fees and that PA 349 applies to employees in the classified civil service. (Pls' App at 22a-23a.) In reaching that decision, the Court of Appeals explained that certain provisions of PERA, including the provisions enacted by PA 349, apply to employees

in the classified service. *Id.* at 13a. It also observed that PA 349 directly conflicts with the Commission's rule that permits the government to enter into agreements with unions to require compulsory union contributions by nonunion public employees. *Id.* at 5a. Recognizing that the Commission is not a fourth branch of government, *id.* at 11a, the Court concluded that the Commission's power to act in its limited sphere does not trump the Legislature's broader constitutional powers. *Id.* at 17a. Instead, harmonizing article 4, § 48, article 4, § 49, and article 11, § 5 requires recognizing that the Commission must "*regulate* all conditions of employment ('shall regulate') consistently with legislative enactments." *Id.* at 15a. Accordingly, the Court of Appeals held that PA 349 is a proper exercise of the Legislature's constitutional authority to enact laws relative to conditions of employment for *all* employees. *Id.*

The Unions timely filed an application for leave to appeal that ruling. This Court granted the Unions' application and directed the Clerk to schedule oral argument for the same future session as the oral argument in *Michigan Coalition of State Employee Unions v Michigan* (Docket No. 147758) (January 29, 2014 Order).

STANDARD OF REVIEW

This Court reviews de novo questions of law, including questions requiring constitutional interpretation. *Mich Dep't of Transp v Tompkins*, 481 Mich 184, 190; 749 NW2d 716 (2008); *Hamed v Wayne Co*, 490 Mich 1, 8; 803 NW2d 237 (2011). Constitutional issues, including whether the separation of powers doctrine applies, are also reviewed de novo. *Harbor Telegraph 2103, LLC v Oakland Co Bd of*

Comm'rs, 253 Mich App 40, 50; 654 NW2d 633 (2002). Accordingly, all of the issues in this case are subject to de novo review.

The burden of proving that a statute is unconstitutional rests with the party challenging it. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 11; 740 NW2d 444 (2007).

ARGUMENT

I. PA 349's application to the classified civil service is wholly consistent with all other provisions of the Michigan Constitution, PERA, relevant case law, and the history of civil service laws in Michigan.

This case turns on the plain text of the Constitution and PA 349, and three basic principles guide this Court's analysis of that language. First, a statute is constitutional "unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003); see also *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307–308; 806 NW2d 683 (2011) (the Court never exercises its power to declare a law unconstitutional unless serious doubt exists with regard to the conflict). And when considering a claim that a statute is unconstitutional, this Court "does not inquire into the wisdom of the legislation." *Taylor*, 468 Mich at 6.

Second, provisions of the Constitution must be read in harmony. *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999).

Third, constitutional provisions are analyzed under the rule of "common understanding"—that is, the meaning the people themselves would have given

them. *Traverse City Sch Dist v Attorney Gen'l*, 384 Mich 390, 405; 185 NW2d 9 (1971). To that end, courts should examine both the circumstances leading up to a provision's adoption and the purpose sought to be accomplished. *Kearney v Bd of State Auditors*, 189 Mich 666, 673; 155 NW 510 (1915).

A. The relevant constitutional provisions work together and confirm that the Legislature's application of PA 349 to classified civil servants is constitutional.

Three constitutional provisions are at play here and must be harmonized. The first, article 4, § 49, provides that "[t]he legislature may enact laws relative to the hours and conditions of employment." Const 1963, art 4, § 49. It contains no limitation, and therefore applies to all employees.

The second, article 4, § 48, confirms that article 4, § 49 applies to all public employees. Article 4, § 48 states that "[t]he legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." But in article 4, § 49, the people did not—as they did only one provision earlier in § 48—exempt members of the state classified civil service from this grant of legislative authority. Therefore, the people's specific exemption of the state classified civil service from the Commission's authority over employee disputes in article 4, § 48 is a conclusive indicator that they did not intend such an exemption in article 4, § 49. In other words, "[w]e cannot assume that the exception for civil service employees, which was purposely placed in § 48 was inadvertently omitted from § 49." (Pls' App at 16a); see also *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011) ("Generally, when language is included in one section of a

statute, but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion."); cf. *Prewett v Weems*, __ F3d __, 2014 WL 1408809 (CA 6, April 14, 2014) ("Omitting a phrase from one statute that Congress has used in another statute with a similar purpose ' virtually commands the . . . inference' that the two have different meanings."), quoting *United States v Ressam*, 553 US 272, 276–277 (2008). (Attached as Ex 1.) So the Legislature's § 49 power applies to *all* workers.

The third provision is article 11, § 5, which again employs the phrase "conditions of employment" and requires the Commission to *regulate* conditions of employment. While the Commission has authority to "classify" all positions in the classified service, "fix" rates of compensation, "approve or disapprove" disbursements, "determine" qualifications, and "make rules and regulations" covering all personnel transactions, those powers are different in scope and in kind from the authority to "regulate." As the Court of Appeals below noted, the ordinary meaning of the word "regulate" is "to govern, direct, or control *according to rule, law, or authority*." (Pls' App at 16a) (emphasis in original), citing *Merriam-Webster's Collegiate Dictionary* p 1049 (11th ed. 2006); see also *Webster's Seventh New Collegiate Dictionary* p 722 (1963) (defining "regulate" as "to govern or direct according to rule" and "to bring under the control of law or constituted authority"). (Attached as Ex 2.) This use of the ordinary dictionary meaning of "regulate" undercuts the Unions' argument that "the Court of Appeals' distinction between "enact laws" and "regulate" is at odds with the "common understanding of those

words" or that its "reading of "regulate" might resonate with only a small percentage of the population "conversant with the intricacies of administrative law." (Unions' Appeal Br, p 19.) The Commission's regulatory authority is therefore subservient to whatever rules, specifications, or requirements the Legislature enacts with respect to "conditions of employment" for all employees under article 4, § 49.

This conclusion makes sense. Because article 11, § 5 and article 4 § 49 were adopted simultaneously, "neither can logically trump the other." (Pls' App at 17a.) And they need not do so. As the Court of Appeals below noted, "[t]he reference to "conditions of employment" in both article 4, § 49, and article 11, § 5, can be read consistently and without deviating from either section's plain language and without encroaching on or expanding the constitutionally granted authority to either the Legislature or the CSC." (Pls' App at 16a-17a.) Indeed, article 4, § 49 empowers the Legislature to "enact laws." Article 11, § 5 authorizes the Commission to "regulate" under those laws. Simply put, the constitutional hierarchy establishes that the Commission's powers regarding conditions of employment are inferior to those of the Legislature.

The Court of Appeals below recognized this hierarchy when it held that "the people of Michigan intended for the Legislature to retain authority . . . over the hours and conditions of employment over *all* employees, without excluding those in the classified civil service." *Id.* at 15a (emphasis added). Thus, contrary to the Unions' position, the Commission's sphere of authority with respect to the

conditions of employment in the classified civil service is not "exclusive and plenary."

Against all this, the Unions characterize article 4, § 49 as "general" and thus ignore it in favor of what they characterize as "more specific" constitutional provisions such as article 4, § 48, and art 11, § 5. (Unions' Appeal Br, pp 31–32.) But this analysis is faulty. For one, the rule that a specific provision controls over a general one applies only when the provisions conflict, and these three provisions do not conflict. *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639; 272 NW2d 495 (1978) ("*When there is conflict* between general and specific provisions in a constitution, the specific provision must control.") (emphasis added). For another, article 4, § 49 is quite specific about whom it addresses (by omitting the express exclusion of the classified service contained in article 4, § 48, it affirmatively *includes* the classified service) and what it addresses (hours and conditions of employment).

The Unions, the dissent below, and the Commission also rely heavily on the holding in *Dudkin v Michigan Civil Service*, 127 Mich App 397; 339 NW2d 190 (1983), for the breadth of the Commission's authority. On appeal, the Unions argue that "once the matter of fair share fees is determined to be a condition of employment for purposes of art 11, § 5, the Legislature may not override the Commission's rulemaking simply because it has now adopted a different policy." (Unions' Appeal Br, p 16.) But as the Court of Appeals majority recognized, "*Dudkin* was decided at a time when our Legislature explicitly permitted

governmental employers and unions to impose agency fees on public employees. . . ." (Pls' App at 23a.) The law has now changed. *Id.* Therefore, *Dudkin* did not need to address the salient issue here: the respective scopes of the Commission's and Legislature's authority over "conditions of employment." That case's holding is inapplicable to this case.

The Unions' proposed interpretation of these provisions is untenable because it (1) eliminates entirely the Legislature's article 4, § 49 authority over the state classified civil service, and (2) renders a nullity the obvious linguistic distinction between article 4, §§ 48 and 49. Rather than harmonizing article 4, § 49 and article 11, § 5, the Unions' interpretation annihilates § 49 in favor of § 5—contrary to basic principles of constitutional analysis. See *Straus*, 459 Mich at 533 (constitutional provisions must be harmonized when possible). The Court of Appeals below rejected that approach and so should this Court.

Perhaps as a buffer to the limitations inherent in § 5's "conditions of employment" language, the Unions present—for the first time—the alternative argument that the Commission has the authority to "make rules and regulations covering all personnel transactions" and that this language "arguably" covers a Commission rule permitting compulsory union fees. (Unions' Appeal Br, p 20.) While "making" a rule is certainly more legislative in nature than "regulating" an already set condition, the Unions' new argument should be rejected for three reasons.

First, typical "personnel transactions" relate to events such as appointments, reappointments, pay, promotions, and benefits—not the act of collecting a forced payment of a union fee. They relate to individuals who are already "personnel," not to the antecedent question whether someone can be hired in the first place. Second, given the reasoning behind the adoption of article 11, § 5 and the historical concerns about coerced union membership and coerced collection of "flower funds"—secret money exacted in exchange for continued employment (Defs' App at 10b, Ex B, 1939 Journal of the Senate No. 33, 277, January 6, 1939 meeting of Committee Investigating the Civil Service Law in Michigan, pp 274, 277)—it is implausible that the people understood "personnel transactions" to include the collection of a compelled union fee payment. Third, this argument was not presented or considered below. This Court has stated that issues raised for the first time on appeal are not ordinarily subject to review. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234–235; 507 NW2d 422 (1993).

B. Application of PA 349 to the classified civil service is consistent with PERA.

The Unions also attempt to avoid the Legislature's authority under § 49 over conditions of employment by arguing that since PA 349 is an amendment of the Public Employment Relations Act, the constitutional basis for PA 349 is § 48, not § 49. (Unions' Appeal Br, pp 20–21.) But section 4a of the PERA expressly refers to the Legislature's authority over employment: it states that "the provisions of the act as to state employees within the jurisdiction of the civil service commission shall

be deemed to apply in so far as the power exists in the legislature *to control employment by the state* or the emoluments thereof." MCL 423.204a (emphasis added). And while the Legislature could have excluded the state classified civil service from § 4a if it wanted to, it has rejected efforts to do just that. (Defs' App at 14b-15b, Ex G, House Legislative Analysis, p 2, SB 1015, December 1996 (discussing a failed bill, 1996 HB 1015).) Because the Legislature both retains in article 4, § 49 the power to "enact laws relative to the hours and conditions of employment" and is authorized under article 4, § 1 to make laws of general applicability, PERA's provisions apply to state employees "within the jurisdiction of the civil service commission." So while PERA does not apply to dispute resolution in the state classified civil service based on the specific exemption in article 4, § 48, it must apply to compulsory union membership and service fees that are conditions of employment.

Additionally, PERA's definition of "public employee" supports applying PERA in the present context to the state classified civil service:

> "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions: [enumerating i – iii, none of which specifically excludes classified civil servants]. [MCL 423.201(e).]

State classified civil service employees fall comfortably within this broad language. Thus, PERA's prohibition on compulsory union memberships or union service-fee

agreements applies to the state classified civil service and does not fall within § 48's "resolution of disputes" limitation.

Finally, PERA is more comprehensive than the mere resolution of disputes. Although courts have previously held that PERA does not apply to the state classified civil service, each of those earlier cases involved employment disputes. Naturally, dispute resolution implicates article 4, § 48 and its exemption for "those in the state classified civil service."

For example, in *Bonneville v MCO*, 190 Mich App 473, 477; 476 NW2d 411 (1991), a case cited by the Unions (Unions' Appeal Br at 15), the Court of Appeals held that Department of Corrections employees had to exhaust Commission *grievance procedures* before bringing an action against their union alleging a breach of a duty of fair representation, where their grievance claimed they were performing work at a higher classification than that for which they were being paid.

Similarly, in *Welfare Employees Union v Civil Serv Commission*, 28 Mich App 343, 351–352; 184 NW2d 247 (1970), another case cited by the Unions, the Court of Appeals held that only the Commission has the power to provide for grievance procedures applicable to the state classified civil service, because the Legislature is "precluded from enacting laws providing for the resolution of disputes concerning public employees in the classified service." The court said nothing about the collective bargaining *process* being related to the "resolution of disputes" within the meaning of § 48. In similar contexts, appellate courts in dicta have cited article 4, § 48 as the explicit constitutional authorization for the enactment of PERA. See, e.g.,

AFSCME Council 25 v Wayne County, 292 Mich App 68, 85; 811 NW2d 4 (2011), quoting *Local 1383, Int'l Ass'n of Fire Fighters, AFL–CIO v City of Warren*, 411 Mich 642, 651; 311 NW2d 702 (1981).

But nowhere on the face of PERA does the Legislature claim to rely exclusively on its article 4, § 48 authority. Nor is there any rule of law that says the Legislature must rely on only a single component of its broad authority when enacting legislation. Although one of PERA's purposes is to prohibit strikes by public employees (which clearly involves the resolution of disputes), see, e.g., MCL 423.203, another is to provide a framework to establish the rights and privileges of public employees. MCL 423.209.

While the scope of PERA is broader than the Unions assert, the scope of article 4, § 48 is narrower. The Unions argue that article 4, § 48 was specifically intended to prevent meddling in "[i]nternal [c]ivil [s]ervice [m]atters" and is a "global limitation on legislative interference with employment relations in the classified service." (Unions' Appeal Br, p 23.) But the plain language of § 48 contradicts that assertion. It prohibits the Legislature from passing laws related to the narrow area of employee disputes within the classified service—not from all internal civil service matters. In any event, compelling membership in or payments to a union is not an internal employment activity. It is not a matter between the employer and the employee, but instead between the employee and the union.

In sum, parts of PERA, including its prohibition on compulsory union membership and service fees, are very much a result of the Legislature's article 4,

§ 49 power. And § 49 does not exempt the state classified civil service. If compulsory union membership and service fees are "conditions of employment"—which is a prerequisite for the Commission having any authority over them—then the Legislature has the power to enact laws relative to those conditions, just as it did with PA 349.

C. Michigan case law and numerous laws of general applicability illustrate the intended limitations on the Commission's authority.

The Court of Appeals majority in this case pointedly rejected the dissent's view "that four unelected, unaccountable members of an executive agency have the authority to decide [this] matter, outside of the public arena," when the Constitution gives that agency no such power. (Pls' App at 26a.) Indeed, as the Court of Appeals recognized, the Commission is not a fourth branch of government. *Id.* at 11a; *see also Straus*, 459 Mich at 537 n 7 (recognizing that the Commission is an administrative agency in the executive branch). Instead, by ratifying a Constitution that contained article 11, § 5, article 4, § 48 and article 4, § 49, the people intended to impose "legislative checks and balances on the CSC's authority." *Id.* at 15a.

The Unions attempt to rebut this by arguing that the concept of a "sharing of constitutional responsibilities" between the Commission and the Legislature is "nebulous" and provides no bright line or workable test for allocating constitutional authority. (Unions' Appeal Br, pp 2–3.) But this concept is hardly rudderless. As demonstrated by the constitutional analysis above, it is wholly defined by the very

constitutional language to which the Commission owes its existence, and Michigan courts ably plotted the course between the two entities' responsibilities.

1. Michigan courts have consistently recognized limits on the Commission's authority.

The Unions argue that the Court of Appeals' theories have "charted an entirely different course" and "cast aside decades of settled case law upholding the Commission's plenary and exclusive authority to regulate conditions of employment. . . ." (Unions' Appeal Br, pp 11, 1.) To the contrary, this Court's case law illustrates those checks and balances and underscores that the Commission's "sphere of authority" has limits.

Council No. 11, for example, examined the conflict between the Political Freedom Act and a Commission rule restricting civil service employees' participation in political activities. 408 Mich at 406-409. This Court concluded that the Commission may not regulate the off-duty political activities of state classified employees unless those activities were found to interfere with job performance. *Id.* at 408–409. In doing so, this Court recognized that the Commission's rule presumptively conflicted with the power of the Legislature to enact the Political Freedom Act, 1976 PA 169. *Id.* at 408. Relying on the plain language of article 11, § 5, this Court cautioned that "[a] grant of power to an administrative agency to pervasively curtail the political freedoms of thousands of citizens should not be easily inferred from a constitutional provision so facially devoid of any such language." *Id.* at 406. The same caution should be applied here.

Tellingly, the Court of Appeals relied on *Council No 11* in reaching its conclusion that PA 349 applies to the classified civil service. (Pls' App at 18a-19a.) The Unions argue that the Court of Appeals misread *Council No. 11* (Unions' Appeal Br, pp 1–2), but it is the Unions that miss the mark. They fail to recognize that the two inquiries are inseparable, that *all* relevant constitutional provisions must be harmonized (including article 4, § 49), and that the Legislature's lawmaking authority is broad and general unless specifically limited by the Constitution.

Other cases from this Court illustrate these points. For example, in *Michigan State AFL-CIO v Civil Service Commission*, 455 Mich 720; 566 NW2d 258 (1997), this Court held that the Commission's rule prohibiting use of union leaves of absence for partisan political activity violated both the Political Freedom Act and the First Amendment. This Court explained that the Commission's "authority to regulate employment-related activity involving *internal matters*" did not extend to the blanket prohibition of off-duty activities, political or otherwise, "simply because such activities could conceivably interfere with satisfactory job performance." *Id.* at 732–733 (emphasis added); see also *Reed v Civil Serv Comm'n*, 301 Mich 137, 151; 3 NW2d 41 (1942) (holding that the Commission does not have the power to decide with finality whether its acts conform to constitutional requirements as a matter of fact or law).

The Court of Appeals, too, has often rejected the position that the Commission can disregard constitutional provisions and applicable state laws. For

example, that court held that the Commission does not have absolute power or exclusive jurisdiction in the area of job discrimination. *Dep't of Civil Rights ex rel Jones v Dep't of Civil Service*, 101 Mich App 295; 301 NW2d 12 (1980). Later, in *Marsh v Department of Civil Service*, 142 Mich App 557, 569; 370 NW2d 613 (1985), that court held that the Commission is not exempt from legislation prohibiting discrimination and securing civil rights in employment—namely, the Elliott-Larsen Civil Rights Act. The court rejected the Commission's argument that state constitutional provisions supersede and preempt *any* legislation regarding employment conditions. *Id.* at 563. Instead, the court emphasized that although article 4, § 48 precludes the Legislature from enacting laws providing for the resolution of disputes in the state classified civil service, "this provision must be read in conjunction with the constitutional provision creating the Civil Rights Commission and the equal protection/anti-discrimination provision of our constitution." *Id.* at 566.

Following the same reasoning, the Ingham County Circuit Court in *Schuette v Civil Service Commission* analyzed whether the Michigan Campaign Finance Act impermissibly intruded into the Commission's sphere of authority. (Pls' App at 17b-21b, Ex C, Ingham Circuit Court No. 08-101-CZ, Order Denying Defs' Mot for Recon, issued Oct 27, 2011.) The court noted that the Commission's authority under article 11, § 5 had to be harmonized with article 2, § 4 of the Michigan Constitution, which grants the Legislature the authority to enact laws "to preserve the secrecy of the ballot, [and] to guard against abuses of the elective franchise. . . ."

Id. The court concluded that the Commission had exceeded its sphere of authority by adopting a rule authorizing a payroll deduction plan to union segregated funds.

This broad collection of cases demonstrates that the Commission's so-called "plenary" authority is in fact limited, including by statutory enactments. Consistent with that limitation, the Court of Appeals below correctly held that the Commission must likewise yield to the constitutional authority of the Legislature in enacting PA 349.

2. Laws of general applicability also recognize limits on the Commission's authority.

There is a crucial distinction between the Legislature's sovereign power to enact laws of general applicability to all employees and the Commission's more limited powers under the Constitution. The Legislature has plenary authority unless that authority is specifically limited. See *Doyle v Election Comm'n*, 261 Mich 546; 246 NW 220 (1933) (the legislature possesses all the powers of parliament in England, except as restricted by the state and federal constitutions); *Harsha v City of Detroit,* 261 Mich 586, 590; 246 NW 849 (1933), citing Cooley, *Constitutional Limitations* (8th ed.) p 183, 177 ("The legislative power is the authority to make, alter, amend, and repeal laws). In this State, it is coextensive with that of the Parliament of England, save as limited and restrained by the state and federal Constitutions." *Nat' Wildlife Fed v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004), overruled on other grounds by *Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; 792 NW2d 686 (2010) ("[T]he legislative article

of the Michigan Constitution does not purport to define the authority of its Legislature . . . . The state judicial power, as with the state legislative power, is plenary, requiring no affirmative grant of authority in the state Constitution."). In other words, legislative power does not depend on any constitutional grant but exists where there is no constitutional *prohibition* of the exercise of that power. And while there is a constitutional prohibition in § 48—the Legislature could not exact laws about the resolution of disputes that applied solely to the classified civil service—that prohibition is not present in § 49. Accordingly, our Legislature has an inherent right to pass laws relating to conditions of employment and to "regulate" in the broadest sense.

The Legislature's broad constitutional authority to enact laws—including those impacting hours and conditions of employment for classified civil service employees—is illustrated by the "wide array of statutes governing employment" that "apply with equal force to private sector and public sector employees, with no exception for civil service employees." (Pls' App at 20a.) Unlike the Legislature, the Commission has only the power enumerated in the Constitution. Simply put, that enumeration *is* the sum total of the Commission's "sphere of authority." Thus, the Legislature's laws of general applicability necessarily limit the Commission's authority.

For example, the Commission has authority to set wages but it cannot set wages in a fashion that discriminates based on gender or race. Nor can it deny state classified civil service employees unemployment or workers' compensation

benefits, or set its own rates for those benefits—despite the fact that article 11, § 5 otherwise allows the Commission to set rates of compensation and regulate conditions of employment. Likewise, the Commission cannot disregard child labor laws or ignore professional licensing requirements that the Legislature sets.

Neither can the Commission adopt lesser safety standards than those imposed by the Michigan Occupational Safety and Health Act, 1974 PA 154. And it cannot put someone in a position to drive a motor vehicle if the person is not properly licensed under state law—even though it sets "qualifications of all candidates for positions in the classified service." If article 11, § 5 were construed as broadly as the Unions suggest, these laws of general applicability would never apply to the state classified civil service. Yet they *do* apply—both because of the general legislative power pursuant to article 4, § 1 and because of the more specific authority of the Legislature to "enact laws relative to the . . . conditions of employment." Const 1963, art 4, § 49. The same holds true here.

In an analogous setting, Michigan's courts have—for 65 years—upheld the Legislature's power to enact laws of general applicability despite the otherwise broad constitutional authority of university boards. In *Peters v Michigan State College*, 320 Mich 243; 30 NW2d 854 (1948), Michigan State College (as Michigan State University was then known) argued that the 1908 predecessor to article 8, § 5—which gave the Boards of Michigan State College, the University of Michigan, and Wayne State general supervisory authority over their respective institutions—precluded the Legislature from enacting laws imposing workers' compensation

requirements on those universities. This Court split 4-4 on the issue, thus affirming the lower court's determination that the college was *not* immune from the workers' compensation act.

In numerous similar cases since, Michigan courts have held that the Legislature's broad police powers override the specific constitutional authority of university boards. E.g., *Regents of the University of Michigan v Employment Relations Commission*, 389 Mich 96; 204 NW2d 218 (1973) (holding collective bargaining rights established by PERA extend to university employees); *Glass v Dudley Paper Co*, 365 Mich 227; 112 NW2d 489 (1961); *Branum v Board of Regents of the University of Michigan*, 5 Mich App 134; 145 NW2d 860 (1966) (holding that statutory waiver of sovereign immunity applied to university).

In *Glass v Dudley Paper Company*, 365 Mich 227, 229; 112 NW2d 489 (1961), for example, plaintiffs argued that the legislative requirement that suits against governmental agencies be initiated in the Court of Claims did not apply to the defendant MSU Board of Trustees, given the Board's express constitutional powers. This Court noted that in several of its prior decisions it had "held that [constitutional provisions] have invested the governing bodies of the 2 universities [MSU and U of M] with the entire control and management of the affairs and property of these institutions, to the exclusion of all other departments of the State government from any interference therewith." *Id.* Nonetheless, this Court held that the Legislature's authority in article 7, § 1 (of the 1908 Constitution)—which authorized the Legislature to establish inferior courts—overrode the boards' control

and permitted the Legislature to establish exclusive jurisdiction over damage claims against the university boards in the Court of Claims..

Here, like the university boards in *Peters* and its progeny, the Unions seek to carve out a separate kingdom for the Commission. But the Commission exists in a system of checks and balances and under the specific authority of the Legislature to enact laws of general application governing "conditions of employment." So even assuming *arguendo* that the opportunity to organize and bargain is a condition of employment under article 11, § 5 (a position Defendants do not concede), such an opportunity is still subject to the Legislature's authority to pass laws relative to the conditions of employment. Const 1963, art 4, § 49. And the Legislature has now said that forced union membership or service fees are prohibited. Accordingly, the Commission must comply with PA 349.

D. The Commission's rule allowing for mandatory union service fees as a condition of continued employment authorizes a condition *for* employment and is thus beyond the Commission's sphere of authority.

The Unions say that union membership, or a mandatory service fee paid to a union, is a condition of employment; in fact, PA 349 uses those very terms. But as the Court below explained, "if agency fees are a condition of employment as the Unions suggest, they are also, undoubtedly, a condition *for* employment, when an employee may be terminated for failure to pay." (Pls' App at 22a.) And this Court in *Council 11* made clear that while the Commission could regulate conditions *of*

employment, it could not regulate conditions *for* employment. *Id.* (citing *Council 11*, 408 Mich at 406.) Such matters are within the province of the Legislature. *Id.*

Practically speaking, the phrase "condition of employment" is not synonymous with any prerequisite the Commission decides to impose. No one would argue, for example, that the Commission has the power to make it a "condition" of employment that an employee become a member of the National Rifle Association or the American Civil Liberties Union.

Thus, it is hardly surprising that when this Court defined the phrase "condition of employment" in 1980 for purposes of analyzing the Commission's authority under article 11, § 5, it focused on *internal* matters: "employment-related activity involving internal matters such as job specifications, compensation, grievance procedures, discipline, collective bargaining and job performance, including the power to prohibit activity during working hours which is found to interfere with satisfactory job performance." *Council No 11*, 408 Mich at 406–407. Compelling membership in a union or paying a service fee to a union is not an internal, employment activity. It is not a matter between the employer and the employee. It is control of the relationship between the employee and a third party: a union.

A look at the historical context of article 11, § 5 also illustrates that the elimination of an employee's choice whether to join or otherwise support a union is not a "condition of employment" as the ratifiers of the 1963 Constitution would have understood that phrase. To the contrary, the 1961 Constitutional Convention

Record is replete with concerns about checks and balances on the Commission's authority. (E.g., Defs' App at 22b, Ex A, Official Record, Const Convention 1961, pp 652, 653, 659, 662–663 (comments from Messrs. Hatch, Shackleton, Knirk, and Brake expressing concern about checks and balances).)

But even earlier, in 1939, the report of the legislative committee investigating the civil service law in Michigan expressed concern about forced payments and union coercion in the public-employment context:

> In the very capitol itself, in the department of state, some 600 employees were coerced, bludgeoned and cajoled into paying more than $20,000. This was known as the "flower fund." [Defs' App at 10b.]
>
> ***
>
> (8) UNION ACTIVITIES
>
> Your Committee finds that the "State, County, and Municipal Workers of America Union," an affiliate of the C.I.O., has threatened and coerced state employees to join the said union, *threatening loss of their job if they did not join*, and protection of their jobs if they did. . . . [*Id.* at 11b (emphasis added).]

Given this publicly expressed concern about compulsory union membership, it is implausible that the people understood § 5 as giving the Commission exclusive authority to compel union membership or payment of union fees as a condition of employment or continued employment.

Consistent with this historical perspective, the Court of Appeals below recognized that compelled payment of agency fees is absolutely antithetical to the reason the people adopted article 11, §5, which "was to provide for a merit-based system of governmental hiring and employment, to eliminate politics, and to provide for an apolitical body to regulate issues regarding employee qualifications,

promotion, and pay, which are matters completely outside the substance and application of PA 349." (Defs App at 22a.) Accordingly, § 5 does not bar PA 349's application to the classified state civil service.

In sum, application of PA 349 to the classified civil service is wholly consistent with all provisions of the Michigan Constitution, PERA and other Michigan statutes, Michigan case law, and the history of civil service laws in Michigan. Accordingly, the Unions' predictions that this Court's affirmance of the majority's decision below will result in "a minefield of confusion and an open invitation to judicial policymaking" (Unions' Appeal Br, pp 29–30) are unfounded. This Court should affirm the decision of the Court of Appeals below.

II. The imposition of compulsory contributions to unions significantly impinges on basic First Amendment rights of *all* public employees, which provides additional support for application of PA 349 to classified civil servants.

The Commission's adoption or continuation of a rule that requires employees to pay service fees to a union as a condition of employment would also impinge on the First Amendment's guarantee of the freedom to associate. "Freedom of association . . . plainly presupposes a freedom not to associate." See *Roberts v United States Jaycees*, 468 US 609, 623 (1984). Moreover, it is generally held to be unconstitutional for the government to require someone to join an expressive association they do not want to join. See, e.g., *Boy Scouts of America v Dale*, 530 US 640 (2000) (holding that a group cannot be required to admit a member that would impair the expression of the group's views). It is also clear that a government may

not, as a condition of public employment, require an individual to relinquish rights guaranteed to him by the First Amendment. See, e.g., *Elrod v Burns*, 427 US 347, 357–360 (1974).

In keeping with these basic principles, the Court of Appeals recognized that "compulsory funding of unions by public-sector employees raises critical First Amendment concerns." (Pls' App at 21a.) That court also noted that various state and federal courts have questioned the constitutionality of agency fee provisions in the public sector. *Id.*

Although the U.S. Supreme Court in *Abood v Detroit Bd of Education*, 43 US 200 (1977), held that a public-sector union can bill nonmembers for chargeable expenses as long as it does not require them to fund its political or ideological projects, that Court appears poised to rethink that holding. Indeed, that Court recently described its prior cases, including *Abood,* which allows employees to be compelled to pay fees to unions, as approaching, if not crossing "the limit of what the First Amendment can tolerate." *Knox v SEIU, Local 1000*, ___US___; 132 S Ct 2277, 2289–91 (2012). And our highest Court has characterized compulsory union fees as "an anomaly," "an act of legislative grace," and "unusual" and "extraordinary." *Id.*; see also *id.* at 2296 (Sotomayor, concurring) ("[W]hile the majority's novel rule is, on its face, limited to special assessments and dues increases, the majority strongly hints that this line may not long endure.").

In fact, the U.S. Supreme Court has pending before it a case, *Harris v Quinn*, No. 11-681, addressing the constitutionality of requiring state employees to pay

service fees to unions. As Justice Kennedy pointed out in oral argument in *Harris*, it is questionable whether "a union can take money from an employee who objects to the union's position on fundamental political grounds." Transcript of 1/21/14 Oral Argument, pp 37-38, *Harris v Quinn*, No 11-681 (Justice Kennedy also observing that a public-employee union's bargaining position "necessarily affects the size of government" and that "the size of government [is] a question on which there are fundamental political beliefs, fundamental convictions that are being sacrificed if a nonunion member objects to this line of policy").

The Unions have not offered any justification for denying classified employees the ability to exercise their First Amendment associational rights (i.e. in refusing to join or support a union), especially given that these rights exist for all other employees in Michigan. Disparate treatment of classified employees might raise equal protection issues which could affect the rights of all employees under the freedom to work legislation.

So although *Abood* remains the state of the law, courts on every level have widely recognized that compulsory agency fees significantly impinge on First Amendment rights of employees who are forced to "associate" with unions in order to keep their jobs. This impingement further supports the Legislature's policy decision to give all employees—including classified civil servants—the right to choose whether to associate with a union through the passage of PA 349. And as the Court of Appeals below recognized, by making contributions to public sector unions voluntary instead of compulsory, the Legislature has "remov[ed] political

and ideological conflict from public employment and eliminate[ed] the repeated need to decide, on a case-by-case basis, whether unions have properly allocated funds." (Pls' App at 21a-22a.) Too, by eliminating compulsory membership or fees, PA 349 ensures that unions compete for members by providing the best service and value.

In the end, even if it is constitutionally *permissible* to force nonunion members to support an organization whose policies they reject, it is not constitutionally *required* that the State agree to that impingement on First Amendment freedoms. Instead, the State can, as it did here, decide the First Amendment costs are too high, and end them.

In the State Defendants' view, forcing government employees to pay union service fees as a condition of employment crosses the line of what the First Amendment can tolerate. It violates the First Amendment rights of employees who do not wish to associate in any way with a union to force them to do so to retain their government employment. The State Defendants recognize that this Court cannot overrule *Abood*, but nevertheless preserve this argument for purposes of possible appeal.

CONCLUSION AND RELIEF REQUESTED

The conclusion that PA 349 applies to the classified civil service is wholly consistent with all other provisions of the State Constitution, the Public Employment Relations Act, relevant case law from this Court and other Michigan courts, and the historical underpinnings of Michigan's civil service system. And it is

consistent with the often-articulated principle that the Civil Service Commission has constitutional authority "in its sphere." This limited sphere includes *regulating* conditions *of* employment in the classified civil service—consistent with the Legislature's authority to enact laws relative to conditions of employment for all employees, both public and private.

Respectfully submitted,

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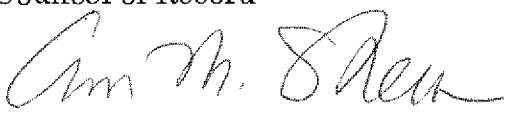

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--- F.3d ----, 2014 WL 1408809 (C.A.6 (Tenn.))

Briefs and Other Related Documents
Judges and Attorneys
Only the Westlaw citation is currently available.

United States Court of Appeals,
Sixth Circuit.
Teresa PREWETT, Mother of minor and next friend of J.W.; J.W., Plaintiffs–Appellees,
v.
Stanley WEEMS, Defendant–Appellant.

No. 12–6489.
April 14, 2014.

Background: Defendant who was convicted, on guilty plea, of one count of producing child pornography was subsequently named as defendant in civil action brought by his victim to obtain compensation for defendant's abuse. The United States District Court for the Eastern District of Tennessee, J. Ronnie Greer, J., 2012 WL 5289481, plaintiff's motion for summary judgment, awarding $1 million in damages, and defendant appealed.

Holdings: The Court of Appeals, Sutton, Circuit Judge, held that:
(1) term "violation," as used in civil remedies provision of child abuse law to permit award to any victim of defendant's violation of child abuse law who suffers personal injury as result of such violation, could not be equated with conviction, but
(2) presumptive damages clause of civil remedies provision of child abuse law, allowing a minor injured by defendant's violation of an enumerated statute meant to protect children from exploitation to recover either the actual damages that he or she sustained or presumptive damages of no less than $150,000 in value, did not apply on a per violation basis.

Reversed and remanded.

West Headnotes

[1] KeyCite Citing References for this Headnote

⇦170B Federal Courts
⇦170BXVII Courts of Appeals
⇦170BXVII(E) Proceedings for Transfer of Case
⇦170Bk3433 Time of Taking Proceeding or Filing Notice of Appeal
⇦170Bk3436 k. Commencement and Running of Time in General. Most Cited Cases

Fourteen-day deadline for filing notice of appeal began to run only from date that district court entered summary judgment against defendant in separate document, and not from issuance of its opinion, one month earlier, on plaintiff's motion for summary judgment. F.R.A.P.Rules 4(a)(1), (7), 28 U.S.C.A.

[2] KeyCite Citing References for this Headnote

⇦110 Criminal Law
⇦110XXVI Incidents of Conviction
⇦110k1220 k. Civil Liabilities to Persons Injured; Reparation. Most Cited Cases

To recover damages under civil remedies provision of child abuse law, victim must establish both a liability predicate for the award, by showing that his abuser violated a qualifying criminal statute, and a damages predicate, which may take form either of actual damages or of presumed damages in an amount not less than $150,000. 18 U.S.C.A. § 2255(a).

[3] KeyCite Citing References for this Headnote

110 Criminal Law
110XXVI Incidents of Conviction
110k1220 k. Civil Liabilities to Persons Injured; Reparation. Most Cited Cases

Term "violation," as used in civil remedies provision of child abuse law to permit award to any victim of defendant's violation of child abuse law who suffers personal injury as result of such violation, could not be equated with conviction and did not require proof that defendant had been convicted of violating an enumerated statute but only proof that defendant had engaged in prohibited conduct. 18 U.S.C.A. § 2255(a).

[4] KeyCite Citing References for this Headnote

110 Criminal Law
110XXVI Incidents of Conviction
110k1220 k. Civil Liabilities to Persons Injured; Reparation. Most Cited Cases

Mere fact that defendant had been convicted of only single count of producing child pornography, for making multiple recordings of minor engaged in sexual activity with prostitutes that defendant had paid for, did not prevent minor, in cause of action to recover damages under civil remedies provision of child abuse law, from establishing as many qualifying "violations" as evidence supported. 18 U.S.C.A. § 2255(a).

[5] KeyCite Citing References for this Headnote

361 Statutes
361III Construction
361III(E) Statute as a Whole; Relation of Parts to Whole and to One Another
361k1159 k. Associated Terms and Provisions; Noscitur a Sociis. Most Cited Cases

Statutory terms are known by the company that they keep.

[6] KeyCite Citing References for this Headnote

110 Criminal Law
110XXVI Incidents of Conviction
110k1220 k. Civil Liabilities to Persons Injured; Reparation. Most Cited Cases

In cause of action to recover damages under civil remedies provision of child abuse law, evidence that defendant had seven separate movies on his cell phone showing a minor engaged in sexual intercourse with prostitutes that defendant had paid for, was sufficient to establish seven qualifying violations of child pornography statute. 18 U.S.C.A. §§ 2251(a), 2255(a).

[7] KeyCite Citing References for this Headnote

110 Criminal Law
110XXVI Incidents of Conviction
110k1220 k. Civil Liabilities to Persons Injured; Reparation. Most Cited Cases

Presumptive damages clause of civil remedies provision of child abuse law, allowing a minor injured by defendant's violation of an enumerated statute meant to protect children from exploitation to recover either the actual damages that he or she sustained or presumptive damages of no less than $150,000 in value, did not apply on a per violation basis, so as to guarantee to minor injured by defendant's multiple violations of child pornography statute in making seven separate movies of minor engaged in intercourse with prostitutes that defendant had paid for a minimum recovery of 7 x $150,000, or $1.05 million; rather, clause imposed a presumptive floor of $150,000 in damages per lawsuit. 18 U.S.C.A. §§ 2251(a), 2255(a).

[8] KeyCite Citing References for this Headnote

⇦361 Statutes
⇦361III Construction
⇦361III(M) Presumptions and Inferences as to Construction
⇦361k1362 k. Nature, Characteristics, and Knowledge of Legislature in General. Most Cited Cases

Court presumes that Congress drafts laws in light of background principles, not in spite of them.

[9] KeyCite Citing References for this Headnote

⇦361 Statutes
⇦361III Construction
⇦361III(M) Presumptions and Inferences as to Construction
⇦361k1372 Statute as a Whole; Relation of Parts to Whole and to One Another
⇦361k1377 k. Express Mention and Implied Exclusion; Expressio Unius Est Exclusio Alterius. Most Cited Cases

Omission of phrase from one statute that Congress has used in another statute with similar purpose virtually commands the inference that the two have different meanings.

[10] KeyCite Citing References for this Headnote

⇦92 Constitutional Law
⇦92XX Separation of Powers
⇦92XX(C) Judicial Powers and Functions
⇦92XX(C)2 Encroachment on Legislature
⇦92k2472 Making, Interpretation, and Application of Statutes
⇦92k2474 k. Judicial Rewriting or Revision. Most Cited Cases

When Congress opts not to include a well-known and frequently used approach in drafting statute, courts should hesitate to pencil it back in under guise of interpretation.

[11] KeyCite Citing References for this Headnote

⇦361 Statutes
⇦361III Construction
⇦361III(C) Clarity and Ambiguity; Multiple Meanings
⇦361k1103 Resolution of Ambiguity; Construction of Unclear or Ambiguous Statute or Language
⇦361k1104 k. In General; Factors Considered. Most Cited Cases

When statute contains some ambiguity, court should not construe it in a way that tags Congress with a taste for the bizarre.

Appeal from the United States District Court for the Eastern District of Tennessee at Greeneville, No. 2:11-cv-00290—J. Ronnie Greer, District Judge.
ON BRIEF: Jessica Chambers McAfee, Greeneville, Tennessee, for Appellant. Duncan Cates Cave, Greeneville, Tennessee, for Appellee. Sonja Ralston, United states Department of Justice, Washington, D.C., for Amicus Curiae.

Before MERRITT, SUTTON and STRANCH, Circuit Judges.

OPINION

SUTTON, Circuit Judge.

***1** Stanley Weems pleaded guilty to one count of producing child pornography. *See* 18 U.S.C. § 2251(a). His victim, J.W., filed this civil action against Weems to obtain compensation for the abuse. *See id.* § 2255(a). The district court awarded $1 million, a figure reached by multiplying the presumed-damages floor in the civil-remedies statute ($150,000) by the number of videos Weems produced (seven) and by capping the damages at the relief sought in J.W.'s complaint ($1 million). This accounting raises an interesting question: Does the civil-remedies statute set a presumptive floor of $150,000 for each criminal *violation* or a presumptive floor of $150,000 for each *cause of action* without regard to the number of alleged violations? As we see it, the text, structure and context of the statute, together with the structure of related civil-remedy laws, establish that the $150,000 figure creates a damages floor for a victim's cause of action, not for each violation. We therefore reverse the district court's contrary conclusion.

I.

From 2007 until 2011, J.W., then a minor, spent time with Weems at his Tennessee home. While there, J.W. frequently had sex with prostitutes hired by Weems. Weems apparently got a kick out of watching the encounters and filming them.

In July 2011, J.W. told the police what had happened. The police searched Weems' home, where they found a cellular phone containing seven videos of J.W. having sex with the prostitutes as well as some audio tapes recording the voices of Weems, J.W. and various prostitutes. In a three-count indictment, the government charged Weems with producing, possessing and persuading a minor to create child pornography. Weems pleaded guilty to the production count, and the district court sentenced him to 180 months.

Soon after the government filed these charges, J.W. filed an action of his own. Invoking 18 U.S.C. § 2255, he sought $1 million in damages for his injuries. He offered some proof of harm—the affidavits of two psychologists identifying the impact of the abuse and describing the likely future treatment needed to recover from it. But he never attempted to prove the extent of his actual damages. He instead relied on the presumptive damages created by the statute ($150,000) and requested that the district court multiply the damages floor by the number of times Weems violated the criminal statute. Over Weems' objection, the district court adopted J.W.'s theory of recovery. It concluded that Weems violated the criminal production statute seven times—one violation for each video found on his cellular telephone—multiplied the $150,000 presumed-damages floor in the statute by seven, and reduced the total ($1,050,000) to reflect the $1 million award requested in J.W.'s complaint.

II.

[1] Before considering the merits of this challenge, we pause to address whether Weems filed an untimely notice of appeal, depriving us of jurisdiction over the case. J.W. reasons that the thirty-day clock for filing an appeal began running the minute the district court issued an opinion on his motion for summary judgment, even though the district court did not enter final judgment against Weems for another month. If the filing deadline ran from the date of the district court's opinion, as opposed to the date of judgment, this notice of appeal indeed would be untimely. But that is not how it works. Rule 4 of the Federal Rules of Appellate Procedure starts the clock upon "entry of the judgment" which, in the case of summary judgment (with an exception not applicable here), requires

an order "set forth on a separate document." Fed. R.App. P. 4(a)(1), (7); *see also* Fed.R.Civ.P. 58. Weems filed his notice of appeal fourteen days after the district court entered judgment against him in a separate document, making his appeal timely under Rule 4. *See Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1250–53 (6th Cir.1997), *overruled on other grounds*, 143 F.3d 263 (6th Cir.1998) (en banc); *see also United States v. Indrelunas*, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed.2d 202 (1973).

III.

***2** [2] Enacted as part of the Child Abuse Victims' Rights Act of 1986, § 2255 empowers victims of child sexual abuse to recover money for the harms caused by their abusers. *See* 100 Stat. 1783, § 703(a) (1986); 18 U.S.C. § 2255. The relevant subsection reads in relevant part:

> Any person who, while a minor, was a victim of a violation of section ... 2251 [among others] ... and who suffers personal injury as a result of such violation ... may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value.

18 U.S.C. § 2255(a). Under the statute, the victim must establish a liability predicate for the award and a damages predicate for the award. As for liability, the victim must show that his abuser violated a qualifying criminal statute. *Id.; see also Doe v. Boland*, 698 F.3d 877, 880–82 (6th Cir.2012). As for damages, the victim may recover either actual damages or presumed damages in an amount "no less than $150,000 in value." 18 U.S.C. § 2255(a).

Weems claims that the district court erred on each front: (1) on liability, by holding that he violated a qualifying criminal statute seven times even though just one conviction arose from his conduct, and (2) on damages, by holding that the statute bestows a minimum $150,000 award for each violation as opposed to each cause of action.

[3] [4] *Liability.* The first question turns on the meaning of "violation" in § 2255. If a violation requires a criminal conviction, Weems may be held civilly liable only for a single violation, as he was convicted of just one qualifying child-abuse crime. But if a violation requires only proof by a preponderance of the evidence that the defendant engaged in prohibited conduct, Weems may be held liable for as many qualifying violations as J.W. proved in his civil case—here seven.

The district court ruled that violations do not require convictions. On the asset side of that decision are three considerations. *First,* the customary meaning of violation tends toward the broad (any failure to conform to a legal standard) rather than the narrow (a criminal conviction). *See, e.g.,* Oxford English Dictionary Online (3d ed. 2012) ("Infringement or breach, flagrant disregard or non-observance of some principle or standard of conduct or procedure, as an oath, promise, law, etc.; an instance of this."); Black's Law Dictionary (9th ed. 2009) ("An infraction or breach of the law; a transgression ... [or t]he act of breaking or dishonoring the law; the contravention of a right or duty."); Webster's Second Int'l Dictionary 2846 (1953) ("Infringement; transgression; non-observance; as, the *violation* of law, covenants, promises, etc.").

[5] *Second,* terms are known by the company they keep, *United States v. Shultz*, 733 F.3d 616, 622 (6th Cir.2013), and the neighboring provisions of § 2255 use "violation" and "conviction" distinctively, suggesting that the different words have different meanings. Section 2255 applies when a victim shows a "*violation* " of the relevant criminal provisions, but the related criminal-forfeiture statute applies only when the government shows the defendant was "*convicted* of an offense." *Compare* 18 U.S.C. § 2253, *with* 18 U.S.C. § 2255 (emphases added). In the context of setting sentencing minimums and maximums, the criminal provisions differentiate between the "violat[ion] or attempt[ ] or conspir[acy] to violate" the statute that the government must prove in the criminal case and any "prior conviction[s]" already adjudicated that the district court must consider in sentencing the individual. *See, e.g.,* 18 U.S.C. § 2252(b). Distinct uses of "violation" and "conviction" throughout these related statutes undermine the idea that the two words mean the same thing.

*3 *Third,* precedent favors this interpretation. Addressing RICO's civil-remedies provision, which also contains a "violation" requirement, the Supreme Court held that the statute's language gave "no obvious indication that a civil action can proceed only after a criminal conviction." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488 (1985). The Court reasoned that "the term 'violation' does not imply a criminal conviction ... [but rather] refers only to a failure to adhere to legal requirements." *Id.* at 489. Noting that other sections of RICO, including the criminal-forfeiture provision and the sentencing-enhancement subsections, employed the term "conviction" rather than "violation," the Court concluded that the two words captured different meanings. *Id.* at 489 & n. 7. Taken together, these considerations prompted the Court to conclude that "the predicate acts" required for civil liability need not "be established beyond a reasonable doubt." *Id.* at 491. Just so here.

On the debit side of this interpretation is one consideration—that it will be more burdensome to show violations than convictions. True enough. As this case well shows, there is nothing to debate about the number of Weems' criminal convictions (one) and there is a debate about the number of Weems' criminal violations (allegedly seven). *See infra.* But two realities more than make up for these inefficiencies: The words of the statute require us to undertake the work, and child abuse injures its victims no less seriously when the conduct does not lead to a successful criminal prosecution than when it does.

[6] Even if each predicate violation does not require an associated criminal conviction, Weems argues that J.W. did not present sufficient evidence to establish seven different violations of § 2251(a). The record shows otherwise. Through an affidavit, Detective Mike Fincher, the investigator in Weems' criminal case, said that he saw "seven movie[s] ... on Stanley Weems' cellular phone that contained images of the minor child, [J.W.] ... having sexual intercourse with prostitutes at Stanley Weems' residence." R. 30–1 at 1. No evidence contradicts this statement. On this record, J.W. has shown seven violations of a qualifying criminal statute. *See United States v. Esch*, 832 F.2d 531, 542 (10th Cir.1987).

[7] *Damages.* That is just half of the problem presented by this appeal—and the easier half at that. Although J.W. has established seven violations of a child-abuse statute, does that entitle him to seven $150,000 presumed-damages awards or just one such award? Put another way, does § 2255 authorize presumptive damage awards of $150,000 *per violation* or $150,000 *per lawsuit* ?

In our view, the presumptive-damages provision applies on a per-lawsuit basis. *First,* the terms of the statute together with the general prohibition against splitting causes of action favor this interpretation. In full, the statute reads:

> *4 **a) In General.**—Any person who, while a minor, was a victim of a violation of section 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value.
>
> **Statute of Limitations.**—Any action commenced under this section shall be barred unless the complaint is filed within 10 years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability.

[8] Section 2255(a)'s two sentences contain two basic thoughts when it comes to this issue. After describing the violations of the relevant statutes that may cause a "personal injury," the first sentence gives the victim a right of action to "recover the actual damages" caused by the violations. The second sentence gives the victim the option of presumed damages, saying that the victim "shall be deemed to have sustained damages of no less than $150,000 ." Missing from the second sentence is any indication that the $150,000 threshold applies on a per-violation basis. That omission is

noteworthy because, when the statute was first enacted in 1986, claimants generally were not permitted to "split a cause of action and bring separate suits upon its parts." Rodman v. Rogers, 109 F.2d 520, 522 (6th Cir.1940); see also Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 319–20, 47 S.Ct. 600, 71 L.Ed. 1069 (1927). The same remains true today. See Ventas, Inc. v. HCP, Inc., 647 F.3d 291, 303–04 (6th Cir.2011). We presume that Congress drafts laws "in light of ... background principle[s]," not in spite of them. Cf. Young v. United States, 535 U.S. 43, 49–50, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002). Thus, when the first sentence of § 2255(a) empowers the victim to "sue" to recover "actual damages," it is fair to presume that Congress is talking about all "actual damages" suffered to date by this victim as a result of all violations of the relevant statutes by this defendant, not one such violation or some such violations. Otherwise, the statute would permit, indeed endorse, claim splitting. Once one accepts that the first sentence contemplates a lawsuit involving all existing actual damages from federal violations suffered by one victim at the hands of a given defendant, the second sentence's reference to presumed "damages of no less than $150,000" must refer to a substitute measure of damages for the "person" entitled to bring the actual-damages lawsuit. That is the import of the beginning of the second sentence—that "[a]ny person as described in the preceding sentence" may seek presumed damages. The upshot is that the same person may seek all actual damages for any federal violations to date or $150,000 as a substitute for them.

*5 *Second,* Congress well knew how to write a statute awarding damages on a per-violation basis but chose not to do so here. Many federal statutes award damages based on "each violation" shown. *See, e.g.,* 17 U.S.C. § 1009(d)(1)(B)(i) (Audio Home Recording Act) ("A complaining party may recover an award of statutory damages *for each violation* ... in the sum of not more than $2,500 per device involved in such violation."); 17 U.S.C. § 1009(d)(1)(B)(ii) (Audio Home Recording Act) ("A complaining party may recover an award of statutory damages *for each violation* ... in the sum of not more than $25 per digital musical recording involved in such violation."); 17 U.S.C. § 1203(c)(3) (Digital Millennium Copyright Act) ("[A] complaining party may elect to recover an award of statutory damages *for each violation* [of the statute] in the sum of not less than $200 or more than $2,500 per act of circumvention, device, product, component, offer, or performance of service."); 18 U.S.C. § 248(c)(1)(B) (Freedom of Access to Clinic Entrances Act) ("In any action ... the plaintiff may elect ... to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 *per violation.*"); 18 U.S.C. § 1388(d)(2),(4) (Respect for the Funerals of Fallen Heroes Act) ("A person bringing an action under [this statute] may elect ... to recover the actual damages suffered by him or her as a result of the violation or ... an award of statutory damages *for each violation* involved in the action ... in a sum of not less than $25,000 or more than $50,000 *per violation.*"); 29 U.S.C. § 1854(e) (Migrant and Seasonal Agricultural Worker Protection Act) ("[I]n an action ... in which a claim for actual damages is precluded ... [for certain violations] the court shall award not more than $10,000 *per plaintiff per violation.*"); 38 U.S.C. § 2413(d)(2),(4) (Respect for America's Fallen Heroes Act) ("A person bringing an action under [this statute] may elect ... to recover the actual damages suffered by him or her as a result of the violation or ... an award of statutory damages *for each violation* involved in the action ... in a sum of not less than $25,000 or more than $50,000 *per violation.*"); 47 U.S.C. § 605(e)(3)(C)(i) (Communications Act) ("[T]he party aggrieved may recover the actual damages suffered by him as a result of the violation ... [or] an award of statutory damages *for each violation* ... involved in the action in a sum of not less than $1,000 or more than $10,000.").

[9] [10] Omitting a phrase from one statute that Congress has used in another statute with a similar purpose "virtually commands the ... inference" that the two have different meanings. United States v. Ressam, 553 U.S. 272, 276–77, 128 S.Ct. 1858, 170 L.Ed.2d 640 (2008). When Congress opts not to include a well known and frequently used approach in drafting a statute, the courts should hesitate to pencil it back in under the guise of interpretation. *See* Dean v. United States, 556 U.S. 568, 572, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009).

*6 *Third,* Congress's decision not to use the familiar "each violation" language in § 2255 is all the more conspicuous when one considers some of the oddities that arise from converting its silence into a statutory directive. If we adopted a per-violation measure of damages, as the government points out in its helpful amicus brief, the differing scopes of the predicate offenses in § 2255 would create anomalous award disparities. Compare a child-sex-trafficking victim who is forced to perform various commercial sex acts over a period of years and a child-pornography victim who is forced to pose for

twenty pictures in a day. While the sex-trafficking victim could show just a single violation (and collect only $150,000 in presumed damages), the child-pornography victim could collect $3 million ($150,000 multiplied by twenty violations). *Compare* United States v. Garcia-Gonzalez, 714 F.3d 306, 311-14 (5th Cir.2013) (measuring the number of violations of 18 U.S.C. § 1591 by the number of victims even though some victims performed multiple commercial sex acts), and *United States v. Brooks*, 610 F.3d 1186, 1192 (9th Cir.2010) (noting a single violation of 18 U.S.C. § 1591 despite multiple sex acts by the same victim), *with Esch*, 832 F.2d at 534, 541-42 (holding that the defendant could be charged with fourteen violations of 18 U.S.C. § 2251(a)—one for each picture taken—even though all "depicted the same two children and were produced in the same photographing session").

[11] Or compare a defendant who sends 100 pornographic images of a child in a single email with a defendant who sends 100 emails that each contain only one such image. While the former victim's presumed damages would be limited to $150,000 for a single child-pornography-transportation offense, the latter victim could collect $15 million for the same harm. *See United States v. Gallardo*, 915 F.2d 149, 151 (5th Cir.1990) (holding that the number of envelopes mailed determines the number of child-pornography-transportation violations under 18 U.S.C. § 2252(a) and thus "[t]he number of photographs in each envelope is irrelevant"). When a statute contains some ambiguity, as this one does, we should not construe it in a way that "tag[s]" Congress with "a taste for the bizarre." *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 201, 120 S.Ct. 1331, 146 L.Ed.2d 171 (2000).

No doubt, victims of multiple violations in some instances may suffer greater damages than victims of a single violation. Take the child-pornography victim known as Amy. Widespread dissemination of images depicting Amy's childhood abuse has caused her to suffer upwards of $3 million in actual damages. *In re Amy Unknown*, 701 F.3d 749, 752-53 n. 3 (5th Cir.2012) (en banc), *cert. granted sub nom. Paroline v. United States*, --- U.S. ----, 133 S.Ct. 2886, 186 L.Ed.2d 932 (2013). How, one might wonder, will a per-lawsuit interpretation of the presumed-damages portion of § 2255 account for these cases of extreme harm resulting from numerous violations? To the extent different defendants commit qualifying violations, separate actions and separate damage awards against each defendant may help. Restatement (Second) of Judgments § 34(3). But where only one defendant causes the harm, the short answer is: A per-lawsuit interpretation of the presumed damages provision won't help such victims. But the reality is that it does not need to because another part of the statute—the alternative actual-damages option—does the trick. The $150,000-presumed-damages provision in § 2255(a) creates a floor, not a ceiling. Any victim who proves that her damages against a single defendant exceed the statutory floor will recover the full extent of the damages she suffered, not a penny less. The $150,000 measure of damages assists only victims who have difficulty proving actual damages; it never caps damages for victims who show harm worth more than $150,000.

***7** The reader might worry that a victim of multiple violations by the same defendant could circumvent our decision by filing a separate complaint for damages for each violation under § 2255. There is no reason to worry for a reason alluded to at the beginning of this analysis: Traditional prohibitions on claim splitting would stand in the way. The doctrine of res judicata or, in modern parlance, claim preclusion prevents a party from re-litigating a cause of action already decided. *See Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 918 F.2d 658, 660 (6th Cir.1990). The limitation applies not only to claims and defenses actually raised in the prior proceeding, but also to those claims or defenses "that should have been raised, but w[ere] not." *Id.* at 661. The rule prevents a plaintiff from "splitting a cause of action" into separate lawsuits and requires him to litigate all the claims he can raise in one case. *Id.; see also* Restatement (Second) of Judgments § 24(1) (1982) ("[T]he claim [precluded] includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."). The rule of course has exceptions but none that would apply here in light of the arguments made by the parties. *See, e.g.*, Restatement (Second) of Judgments § 26(1)(c) (Claims or theories not raised will not be precluded if the plaintiff "was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts.").

As for J.W., he did not bring separate lawsuits for each alleged federal violation. Nor could he have done so given that all of his federal claims arose out of the same unbroken chain of events from 2007 to 2011. J.W. thus has a single cause of action for damages under § 2255. Since J.W. did not offer any proof of actual damages exceeding the $150,000 floor, that floor became his presumptive award. Accordingly, the district court's presumed-damages award for $1 million must be vacated, and the case remanded. On remand, the district court may decide whether J.W. has forfeited any argument that his actual damages exceed $150,000 and, if he has not, whether to allow the parties the opportunity to offer proof of J.W.'s actual damages.

IV.

For these reasons, we reverse and remand.

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- 2014 WL 495062 (Appellate Brief) Brief for the United States as Amicus Curiae in Support of Appellant (Jan. 29, 2014) Original Image of this Document (PDF)
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- 12-6489 (Docket) (Nov. 30, 2012)

Judges and Attorneys (Back to top)

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Judges

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Greenville, Tennessee 37743
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- **Merritt, Hon. Gilbert Stroud Jr.**
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of memories and acquired skills esp. as a physiological change accompanying aging **c** : reversion to an earlier mental or behavioral level **d** : the amount by which the conditional expectation of one of two correlated variables is closer to the mean of its set than are given values of the second to the mean of its set **3** : retrograde motion esp. of an astronomical orbital characteristic

re·gres·sive \ri-'gres-iv\ *adj* **1** : tending to regress or produce regression **2** : being, characterized by, or developing in the course of an evolutionary process involving increasing simplification of bodily structure **3** : decreasing in rate as the base increases ⟨~ tax⟩ — **re·gres·sive·ly** *adv* — **re·gres·sive·ness** *n*

¹re·gret \ri-'gret\ *vb* **re·gret·ted; re·gret·ting** [ME *regretten*, fr. MF *regreter*, fr. OF, fr. *re-* + *-greter* (of Scand origin; akin to ON *grāta* to weep) — more at GREET] *vt* **1 a** : to mourn the loss or death of **b** : to miss poignantly **2** : to be keenly sorry for ~ *vi* : to experience regret — **re·gret·ta·ble** \-'gret-ə-bəl\ *adj* — **re·gret·ta·bly** \-blē\ *adv* — **re·gret·ter** *n*

²regret *n* **1** : sorrow aroused by circumstances beyond one's power to remedy **2 a** : an expression of sorrow, disappointment, or other distressing emotion **b** *pl* : a note politely declining an invitation **syn** see SORROW — **re·gret·ful** \-'gret-fəl\ *adj* — **re·gret·ful·ly** \-fə-lē\ *adv* — **re·gret·ful·ness** *n*

re·gret·less \ri-'gret-ləs\ *adj* : feeling no regret

re·group \(')rē-'grüp\ *vb* : to form into a new grouping — **re·group·ment** \-mənt\ *n*

re·grow \(')rē-'grō\ *vi* : to grow (as a missing part) anew ~ *vt* : to continue growth after interruption or injury

¹reg·u·lar \'reg-yə-lər\ *adj* [ME *reguler*, fr. MF, fr. LL *regularis* regular, fr. L, of a bar, fr. *regula* rule — more at RULE] **1** : belonging to a religious order **2 a** : formed, built, arranged, or ordered according to some established rule, law, principle, or type **b** (1) : both equilateral and equiangular ⟨a ~ polygon⟩ (2) : having faces that are congruent regular polygons and all the polyhedral angles congruent ⟨a ~ polyhedron⟩ **c** *of a flower* : having the members of each whorl symmetrical with respect to form **d** : having or constituting an isometric system ⟨~ crystals⟩ **3 a** : ORDERLY, METHODICAL **b** : recurring or functioning at fixed or uniform intervals **4 a** : constituted, conducted, or done in conformity with established or prescribed usages, rules, or discipline **b** : NORMAL, CORRECT: as (1) : undeviating in conformance to a set standard (2) : COMPLETE, UNMITIGATED ⟨a ~ scoundrel⟩ **c** (1) : conforming to the normal or usual manner of inflection (2) : WEAK 7 **5 a** : of, relating to, or constituting the regular army of a state **b** : constituting or made up of individuals properly recognized as legitimate combatants in war — **reg·u·lar·i·ty** \,reg-yə-'lar-ət-ē\ *n* — **reg·u·lar·ly** \'reg-yə-lər-lē\ *adv*

syn NORMAL, TYPICAL, NATURAL; REGULAR stresses conformity to a rule, standard, or pattern; NORMAL implies lack of deviation from what has been discovered or established as the most usual or expected; TYPICAL implies showing all important traits of a type, class, or group and may suggest lack of strong individuality; NATURAL applies to what conforms to a thing's essential nature, function, or mode of being

²regular *n* **1** : one who is regular: as **a** : one of the regular clergy **b** : a soldier in a regular army **c** : a player on an athletic team who usu. starts every game **2** : a clothing size designed to fit the person of average height

regular army *n* : a permanently organized body constituting the army of a state and being often identical with the standing army maintained by a federal government

reg·u·lar·ize \'reg-yə-lə-,rīz\ *vt* : to make regular by conformance to law, rules, or custom — **reg·u·lar·iz·er** *n*

regular solid *n* : any of the five regular polyhedrons

regular year *n* : a common year of 354 days or a leap year of 384 days in the Jewish calendar

reg·u·late \'reg-yə-,lāt\ *vt* [LL *regulatus*, pp. of *regulare*, fr. L *regula*] **1 a** : to govern or direct according to rule **b** : to bring under the control of law or constituted authority **2** : to reduce to order, method, or uniformity **3** : to fix or adjust the time, amount, degree, or rate of — **reg·u·la·tive** \-,lā-tiv\ *adj* — **reg·u·la·tor** \-,lāt-ər\ *n* — **reg·u·la·to·ry** \-lə-,tōr-ē, -,tòr-\ *adj*

reg·u·la·tion \,reg-yə-'lā-shən\ *n* **1** : the act of regulating : state of being regulated **2 a** : an authoritative rule dealing with details of procedure **b** : a rule or order having the force of law issued by an executive authority of a government **3 a** : redistribution of material (as in an embryo) to restore a damaged or lost part independent of new tissue growth **b** : the mechanism by which an early embryo maintains normal development **syn** see LAW

reg·u·lus \'reg-yə-ləs\ *n* [NL, fr. L, petty king, fr. *reg-*, *rex* king — more at ROYAL] **1** *cap* : a first-magnitude star in the constellation Leo **2** [ML, metallic antimony, fr. L] : the more or less impure mass of metal formed beneath the slag in smelting and reducing ores

re·gur·gi·tate \(')rē-'gər-jə-,tāt\ *vb* [ML *regurgitatus*, pp. of *regurgitare*, fr. L *re-* + LL *gurgitare* to engulf, fr. L *gurgit-*, *gurges* whirlpool — more at VORACIOUS] *vi* : to become thrown or poured back ~ *vt* : to throw or pour back or out

re·gur·gi·ta·tion \(,)rē-,gər-jə-'tā-shən\ *n* : a regurgitating; as **a** : the casting up of incompletely digested food (as by some birds in feeding their young) **b** : the backward flow of blood through a defective heart valve

re·ha·bil·i·tant \,rē-(h)ə-'bil-ə-tənt\ *n* : a disabled person undergoing rehabilitation

re·ha·bil·i·tate \,rē-(h)ə-'bil-ə-,tāt\ *vt* [ML *rehabilitatus*, pp. of *rehabilitare*, fr. L *re-* + LL *habilitare* to habilitate] **1 a** : to restore to a former capacity : REINSTATE **b** : to restore to good repute by vindicating **2 a** : to restore to a state of efficiency, good management, or solvency **b** : to restore to a condition of health or useful and constructive activity — **re·ha·bil·i·ta·tion** \-,bil-ə-'tā-shən\ *n* — **re·ha·bil·i·ta·tive** \-'bil-ə-,tāt-iv\ *adj*

re·hash \(')rē-'hash\ *vt* : to present or use again in another form without substantial change or improvement — **rehash** \'rē-,\ *n*

re·hear·ing \(')rē-'hi(ə)r-iŋ\ *n* : a second or new hearing by the same tribunal

re·hears·al \ri-'hər-səl\ *n* **1** : something recounted or told again : RECITAL **2 a** : a private performance or practice session preparatory to a public appearance **b** : a practice exercise : TRIAL

re·hearse \ri-'hərs\ *vb* [ME *rehersen*, fr. MF *rehercier*, lit., to harrow again, fr. *re-* + *hercier* to harrow, fr. *herce* harrow — more at HEARSE] *vt* **1 a** : to say again : REPEAT **b** : to recite aloud in a formal manner **2** *archaic* : to present an account of : RELATE **3** : to recount in order : ENUMERATE **4 a** : to give a rehearsal of **b** : to train or make proficient by rehearsal **5** : to perform or practice as if in a rehearsal ~ *vi* : to engage in a rehearsal — **re·hears·er** *n*

re·house \(')rē-'haùz\ *vt* : to establish in a new or different housing unit of a better quality

re·hy·drate \(')rē-'hī-,drāt\ *vt* : to restore fluid lost in dehydration to — **re·hy·dra·tion** \(,)rē-,hī-'drā-shən\ *n*

reichs·mark \'rīk-,smärk\ *n, pl* **reichsmarks** *also* **reichsmark** [G, fr. *reich* empire + *mark*] : the German mark from 1925 to 1948

re·ify·ca·tion \,rā-ə-fə-'kā-shən, ,rē-\ *n* : the process or result of reifying

re·ify \'rā-ə-,fī, 'rē-\ *vt* [L *res* thing — more at REAL] : to regard (something abstract) as a material thing

¹reign \'rān\ *n* [ME *regne*, fr. OF, fr. L *regnum*, fr. *reg-*, *rex* king — more at ROYAL] **1 a** : royal authority : SOVEREIGNTY **b** : the dominion, sway, or influence of one resembling a monarch **2** : the period of reign of a sovereign

²reign *vi* **1 a** : to possess or exercise sovereign power : RULE **b** : to hold office as chief of state although exercising minimal powers of making and executing governmental policy **2** : to exercise authority or hold sway in the manner of a monarch **3** : to be predominant or prevalent

reign of terror [*Reign of Terror*, a period of the French Revolution that was conspicuous for mass executions of political suspects] : a state or a period of time marked by conditions of violence that produce terror among the people involved

re·im·burs·able \,rē-əm-'bər-sə-bəl\ *adj* : REPAYABLE

re·im·burse \,rē-əm-'bərs\ *vt* [*re-* + obs. E *imburse* (to pocket money, pay)] **1** : to pay back to someone : REPAY **2** : to make restoration or payment of an equivalent to **syn** see PAY — **re·im·burse·ment** \-'bər-smənt\ *n*

re·im·pres·sion \,rē-əm-'presh-ən\ *n* : REPRINT 1

¹rein \'rān\ *n* [ME *reine*, fr. MF *rene*, fr. (assumed) VL *retina*, fr. L *retinēre* to restrain — more at RETAIN] **1** : a line fastened to a bit on each side by which a rider or driver controls an animal — usu. used in pl. **2 a** : a restraining influence : CHECK **b** : controlling or guiding power **3** : complete freedom : SCOPE — usu. used in the phrase *give rein to*

²rein *vt* **1** : to check or stop by or as if by a pull at the reins **2** : to control or direct with or as if with reins ~ *vi* **1** *archaic* : to submit to the use of reins **2** : to stop or slow up one's horse or oneself by or as if by pulling the reins

re·in·car·na·tion \(,)rē-,in-,kär-'nā-shən\ *n* **1 a** : the action of reincarnating : the state of being reincarnated **b** : rebirth in new bodies or forms of life; *esp* : a rebirth of a soul in a new human body **2** : a fresh embodiment — **re·in·car·na·tion·ist** \-sh(ə-)nəst\ *n*

rein·deer \'rān-,di(ə)r\ *n, pl* **reindeer** *also* **reindeers** [ME *reinder*, fr. ON *hreinn* reindeer + ME *deer*] : any of several deer (genus *Rangifer*) inhabiting northern Europe, Asia, and America and having antlers in both sexes

reindeer moss *n* : a gray, erect, tufted, and much-branched lichen (*Cladonia rangiferina*) that forms extensive patches in arctic and north-temperate regions, constitutes a large part of the food of reindeer, and is sometimes eaten by man

re·in·fec·tion \,rē-ən-'fek-shən\ *n* : infection following recovery from or superimposed on infection of the same type

re·in·force \,rē-ən-'fō(ə)rs, -'fò(ə)rs\ *vb* [*re-* + *inforce*, alter. of *enforce*] *vt* **1** : to strengthen by additional assistance, material, or support **2 a** : to strengthen with additional forces **b** : to strengthen or increase by fresh additions ~ *vi* : to seek or get reinforcements — **re·in·forc·er** *n*

reinforced concrete *n* : concrete in which metal (as steel) is embedded so that the two materials act together in resisting forces

re·in·force·ment \,rē-ən-'fōr-smənt, -'fòr-\ *n* **1** : the action of reinforcing or the state of being reinforced **2** : something that reinforces

rein·less \'rān-ləs\ *adj* : having no reins : UNCHECKED

reins \'rānz\ *n pl* [ME, fr. MF & L; MF, fr. L *renes*] **1 a** : KIDNEYS **b** : the region of the kidneys : LOINS **2** : the seat of the feelings or passions

reins·man \'rānz-mən\ *n* : a harness driver : JOCKEY

re·in·state \,rē-ən-'stāt\ *vt* **1** : to place again **2** : to restore to a previous effective state — **re·in·state·ment** \-mənt\ *n*

re·in·sur·ance \,rē-ən-'shůr-ən(t)s, *esp South* (')rē-'in-,\ *n* : insurance by a reinsurer

re·in·sure \,rē-ən-'shů(ə)r\ *vt* **1** : to insure again by transferring to another insurance company all or a part of a liability assumed **2** : to insure again by assuming all or a part of the liability of an insurance company already covering a risk ~ *vi* : to provide increased insurance — **re·in·sur·er** *n*

re·in·te·grate \(')rē-'int-ə-,grāt\ *vt* [ML *reintegratus*, pp. of *reintegrare* to renew, reinstate, fr. L *re-* + *integrare* to integrate] : to integrate again into an entity or restore to unity after disintegration — **re·in·te·gra·tion** \(,)rē-,int-ə-'grā-shən\ *n* — **re·in·te·gra·tive** \(')rē-'int-ə-,grāt-iv\ *adj*

re·in·ter·pret \,rē-ən-'tər-prət, *rapid* -pət\ *vt* : to interpret again; *specif* : to give a new or different interpretation to — **re·in·ter·pre·ta·tion** \-,tər-prə-'tā-shən, *rapid* -pə-\ *n*

re·in·vest \,rē-ən-'vest\ *vt* **1** : to invest again or anew **2 a** : to invest (as income from investments) in additional securities **b** : to invest in a business rather than distribute as dividends or profits — **re·in·vest·ment** \-'ves(t)-mənt\ *n*

re·in·vig·o·rate \,rē-ən-'vig-ə-,rāt\ *vt* : to give renewed or fresh vigor to — **re·in·vig·o·ra·tion** \-,vig-ə-'rā-shən\ *n*

re·is·sue \(')rē-'ish-(,)ü, -ü\ *vi* : to come forth again ~ *vt* : to issue again; *esp* : to cause to become available again — **reissue** *n*

re·it·er·ate \rē-'it-ə-,rāt\ *vt* [L *reiteratus*, pp. of *reiterare* to repeat, fr. *re-* + *iterare* to iterate] : to say or do over again or repeatedly sometimes with wearying effect **syn** see REPEAT — **re·it·er·a·tion**

See *re-* and 2d element					
regrind	rehammer	rehearing	reimpose	reincorporate	reintroduce
regrow	rehandle	reheat	reimposition	reinsert	reintroduction
regrowth	rehear	rehouse	reincarnate	reinsertion	reinvasion